

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

KAREN RAYL, as Special Co-
Administrator of the Estate of Mark
Ottovich,

Plaintiff and Appellant,

v.

LEO F. BAUTISTA,

Defendant and Respondent.

A154347

(Alameda County
Super. Ct. No. RG16842710)

Mark Ottovich¹ appeals a judgment of dismissal entered after the trial court declared him to be a vexatious litigant under Code of Civil Procedure section 391, subdivision (b),² and he failed to post a \$40,000 security under sections 391.1 and 391.4. On appeal, he challenges the underlying order requiring him to post a security, and argues

¹ Ottovich died on July 31, 2018, while this appeal was pending. Respondent Leo F. Bautista was appointed the personal representative of the estate. Because of the obvious conflict Bautista would face in representing both sides of this appeal, we advised the parties and Ottovich's next of kin that this Court would dismiss the appeal if no other personal representative or successor in interest was appointed. (See Code Civ. Proc., § 377.30–377.33.) The trial court has appointed Ottovich's sister Karen Rayl as special co-administrator and has given her "sole authority to appear in and prosecute, settle, or dismiss, any and all litigation that deceased, Mark Ottovich, is presently involved in" until May 28, 2019. We therefore decide the appeal on the merits, and refer to Ottovich in the present tense for the purposes of discussing his claims.

² Further references are to the Code of Civil Procedure unless otherwise specified.

the trial court erred in determining he did not have a reasonable probability of prevailing on his claims. We affirm.

I. BACKGROUND

Jack Ottovich, the father of Ottovich, died in 2001, holding title to real property in San Lorenzo, California. In October 2015, the superior court appointed respondent Leo F. Bautista to be the special administrator of the estate of Jack Ottovich. Bautista took steps to acquire possession of the San Lorenzo property for the estate. Ottovich has, in this and in other litigation, unsuccessfully claimed a right to the property.³

Ottovich was previously declared to be a vexatious litigant. Through counsel, he filed the instant complaint alleging Bautista had unlawfully entered the San Lorenzo property and had taken possession of that property and Ottovich's belongings. The complaint stated 11 causes of action to include: Civil Code section 789.3, subdivision (b), wrongful eviction, breach of the covenant of quiet enjoyment in violation of Civil Code section 1927, breach of the covenant of quiet enjoyment, intentional infliction of emotional distress, negligent infliction of emotional distress, breach of the covenant of good faith and fair dealing, trespass to real property, trespass to chattels, conversion and unfair business practices under Business and Professions Code, section 17200.

On January 17, 2017, Bautista filed a motion asking the court to require Ottovich to post a \$40,000 security under section 391.1, because there was no reasonable probability of his prevailing in the litigation. The court granted this motion on May 16, 2017, and ordered Ottovich to post a \$40,000 security by June 1, 2017.⁴ Bautista noted in his motion that Probate Code sections 9650, 9651 and 9654 give the administrator of an estate the right to take possession of its property, and provide that he or she cannot be held liable for taking property believed in good faith to be part of the estate.

³ Ottovich has been involved in and pursued much litigation related to his parents' probate estates. This history is not relevant to this appeal.

⁴ A defendant may seek to have a plaintiff who is a vexatious litigant furnish a security even if, as here, the plaintiff is represented by counsel. (See *Shalant v. Girardi* (2011) 51 Cal.4th 1164, 1173.)

Ottovich, having been declared a vexatious litigant, was ordered to furnish a \$40,000 security by June 1, 2017. (Code Civ. Proc., § 391.1–391.3.) He did not do so and the case against Bautista was dismissed April 23, 2018. (Code Civ. Proc., § 391.4.) Ottovich appealed from the judgment of dismissal.

II. DISCUSSION

At the outset, we note that Bautista did not file a respondent’s brief and that oral argument has been waived. Accordingly, we decide the appeal on the record and the opening brief. (Cal. Rules of Court, rule 8.220(a)(2).) We also note that Ottovich does not dispute his status as a vexatious litigant, arguing instead that notwithstanding, he has a reasonable probability of prevailing in *this* action and should not have been required to post a security.

An order requiring the posting of a security is not directly appealable, but if the plaintiff fails to furnish that security, an appeal lies from the judgment of dismissal that follows. (*Golin v. Allenby* (2010) 190 Cal.App.4th 616, 618 (*Golin*).) A trial court may order a vexatious litigant to post a security as a condition of prosecuting a pending lawsuit if it determines “there is no reasonable probability that the plaintiff will prevail in the litigation against the moving defendant. . . .” (§§ 391.1, 391.3, subd. (a).)

We review a trial court’s determination of whether the vexatious litigant has a reasonable chance of prevailing under a substantial evidence standard of review. (*Moran v. Murtaugh Miller Meyer & Nelson, LLP* (2007) 40 Cal.4th 780, 784–786.) In determining whether a plaintiff has no reasonable probability of prevailing in a litigation against a moving defendant, the trial court may weigh evidence presented on the motion to require a security. (*Ibid.*) The court is not required to assume the truth of the plaintiff’s alleged facts. (*Id.* at p. 782.) “If there is any substantial evidence to support the [trial] court’s determination, it will be upheld.” (*Golin, supra*, 190 Cal.App.4th at p. 636.) “To the extent we are called upon to determine the proper interpretation of a statutory provision, we do so independently under a de novo review.” (*Garcia v. Lacey* (2014) 231 Cal.App.4th 402, 408.)

Here, Ottovich's claims against Bautista pertaining to his (Ottovich's) right to possess the San Lorenzo property itself either have been resolved adversely to him by the courts (see *Estate of Ottovich* (Dec. 20, 2017, A147431) [nonpub. opn.]) or are barred by the principle that a personal representative is immune from a lawsuit by an heir for possession of the property. (Prob. Code, § 9654.) Substantial evidence therefore supports the trial court's determination that Ottovich did not have a reasonable possibility of prevailing on these claims.

That some of Ottovich's claims pertain to Bautista's alleged interference with personal property owned by Ottovich and left on the real property, and do not implicate his right to possess the real property itself, does not change this result. Ottovich argues he had a reasonable probability of prevailing on three causes of action pertaining to his personal property: conversion, trespass to chattels and wrongful eviction. We consider each of these claims, as we assume the probability of prevailing on even one of them would require a reversal of the dismissal. (See *Golin, supra*, 190 Cal.App.4th at p. 641.)

The wrongful eviction claim pertains to Ottovich's possessory interest in the land, and lacked merit for the reasons stated above. In any event, Ottovich's claim to be a lawful tenant of the property is not supported by evidence of any lease, and substantial evidence supports the trial court's conclusion there was no reasonable probability he would prevail.

As to conversion and trespass to chattels, the law allows an administrator to refuse to surrender disputed items to secure a reasonable opportunity to inquire into the claimant's right. (*Giacomelos v. Bank of America* (1965) 237 Cal.App.2d 99, 100–101.) Moreover, the Probate Code expressly provides a procedure for the resolution of adverse claims of ownership to real and personal property being held by the estate. (See, e.g., Probate Code, § 850, subd. (a)(2)(C).) The statutory scheme also relieves a personal representative, acting in good faith, of liability for taking possession of real and personal property that is subsequently determined to belong to third parties. (Probate Code, § 9651, subd. (a)(2).) The trial court could reasonably conclude that Bautista would have a

compete defense to Ottovich's claims for conversion and trespass to chattels under these provisions.

III. DISPOSITION

The judgment is affirmed. In the interests of justice, the parties shall bear their own costs.

NEEDHAM, J.

We concur.

SIMONS, J.

BURNS, J.

Ottovich v. Bautista / A154347